No. 75-1509

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

FILED
APR 19 1976
MICHAEL RODAK, JR., CLERK

RANDOLPH PHILLIPS, as CHAIRMAN of THE COMMITTEE FOR FAIR PLAY FOR VOTERS and as a qualified voter of the United States and on behalf of all such voters similarly situated,

Petitioner,

-against-

GERALD R. FORD as claimant to the title and office of PRESIDENT of the UNITED STATES of AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner Pro Se
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Randolph Phillips, as Chairman of THE COMMITTEE FOR FAIR PLAY FOR VOTERS and as a qualified voter of the United States and on behalf of all such voters similarly situated, plaintiff-appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1976.

OPINIONS BELOW

The Opinion of the District Court for the District of Columbia is not reported and appears

at pages A-1-2 hereafter. The Opinion of the Court of Appeals is not reported and appears at pages A-3 to A-6 hereafter.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1976 and appears at page A-7 hereafter. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Where the complaint alleges uncontested facts establishing the undenied conclusion that President Richard M. Nixon and Vice-President Spiro T. Agnew obtained their re-election on November 7, 1972 by fraud and acts of breach of trust, and thereafter resigned from office under pressure of pending impeachment and criminal proceedings, does a qualified voter of the United States have standing to sue, on behalf of himself and the 28,357,667 similarly situated losing voters for the McGovern-Shriver ticket, for a declaratory judgment to determine the legality of the fraudulently elected President's appointment of a Vice President to succeed him?

2. Was it correct for the Court of Appeals to affirm dismissal of the complaint on the basis of the doctrine of Ex Parte Levitt, 302 U. S. 633 (1937) that plaintiff's interests are "undifferentiated from that of the general public" when one Party retains the fruits of its corrupt victory and was opposed by petitioner and 28,357,667 members of the voting public?

3. May it fairly be said that the remedy which a losing voter for the losing candidate of the Democratic Party and persons similarly situated - some 28,357,667 McGovern-Shriver voters - seeks of declaring the election invalid for fraud, is "merely a general interest common to all members of the public" when it is a notorious fact that "the public" was split into two opposing camps at the November, 1972 election, some 45,767,218 persons having voted for the Nixon-Agnew ticket?

4. Since there appears to be no precedent for extending the Ex parte Levitt doctrine to partisan and contested voting rights cases, and the complaint clearly alleges a "case or controversy" of a McGovern-Shriver voter against the Nixon-Agnew candacies, and the subsequent appointment of Gerald R. Ford as Vice-President, does not the decision of the Court of Appeals deprive petitioner of his Constitutional right under Article III of the Constitution of the United States to have the federal courts adjudicate his "case or controversy", which clearly arises under the Constitution and also in view of diversity jurisdiction invokes the common law applicable to corrupt elections?

5. Does the doctrine of Ex Parte Levitt apply to bar petitioner's standing to sue for a declaratory judgment that the appointment of Gerald R. Ford as Vice-President of the United States violated Article I, Section 6, Clause 2 (the "emoluments clause") ? Since the views on this issue were not "common" to all members of the House of Representatives,

some 35 of whom voted against respondent Ford's confirmation as Vice President after this issue was raised in the House, while 387 members voted for confirmation, is not the Court of Appeals' extension of the Ex Parte Levitt doctrine to these facts a violation of its rule that the interest to be vindicated be "common" to all concerned ?

6. Since the Congress enacted with the approval of the President of the United States Public Law 93-178 (December 10, 1973) authorizing "Any person aggrieved by an action of the Attorney General (to) bring a civil action in the appropriate district court of the United States to contest the constitutionality of the appointment and continuance in office of the Attorney General on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution" (the "emoluments clause"), has not the premise of Ex Parte Levitt, which was an attack on a new member of this Court based on this clause, been superseded by an appropriate declaration of Congressional policy that an appointment of the President, subject to confirmation by the Senate, may be attacked for violation of the "emoluments clause" by an aggrieved person - here an aggrieved voter - in the federal courts?

Relevant Sections of the CONSTITUTION of the UNITED STATES

ARTICLE II, Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and together with the Vice President, chosen for the same Term, be elected as follows * * * *

* * *

ARTICLE I, Section 6, Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any Civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such Time] * * *

The meaning of "elected" in Article II, Section 1 of the Constitution.

"Elected" can only mean "fair and honestly elected." It cannot mean "elected by fraud or other corrupt means." To import such a meaning into the intention of the Founding Fathers would be to state they created a Republic and simultaneously the means for its destruction.

STATEMENT OF THE CASE

The complaint herein was filed on May 15, 1974. Defendant GERALD R. FORD was served with the summons and complaint while still acting as Vice President of the United States on July 10, 1974. On July 30, 1974 he moved to dismiss the case for lack of subject matter jurisdiction. On or about September 3, 1974, plaintiff RANDOLPH PHILLIPS, as CHAIRMAN of the COMMITTEE for FAIR PLAY FOR VOTERS and as a qualified voter of the United States and on behalf of all other persons similarly situated, i.e., the voters for the McGovern-Shriver ticket at the November 7, 1972 election, moved for (1) declaratory judgment on Counts I and II of the complaint alleging that the Nixon-Agnew ticket had obtained its re-election at said election by acts of fraud and breach of trust and alleging in support thereof the WATER-GATE evidence and the evidence before the House Judiciary Committee's impeachment inquiry, and Nixon's admissions with respect to the tapes; and (2) for summary judgment on Count III, which also alleged uncontested facts that FORD was appointed VICE PRESIDENT of the UNITED STATES on October 12, 1973 after he had voted on September 1969, while a member of the House of Representatives, to increase the salary of the Vice President of the United States from $43,000 annually to $62,500 annually; and after he had voted on October 11, 1973, while a member of the House, for "cost-of-living" increases in the annuity payable to the Vice President as a federal retirement benefit. The complaint alleged without contradiction at any time that the subsequent appointment of defendant FORD violated

ARTICLE I, section 6, clause 2 (the "emoluments clause") of the CONSTITUTION of the UNITED STATES.

After defendant FORD'S motion to dismiss had been made on July 30, 1974 snd prior to plaintiff making his motions on September 3, 1974 for declaratory judgment and summary judgment, Richard M. Nixon resigned as President of the United States on August 9, 1974 (Agnew having resigned as Vice President prior thereto and defendant FORD having been appointed VICE PRESIDENT as aforesaid on October 12, 1973) and FORD took on August 9, 1974 the oath of office as PRESIDENT of the UNITED STATES.

The parties, including the courts below, treated the accession of defendant FORD to the office of PRESIDENT of the UNITED STATES as in substance and effect a supplemental allegation to the complaint, this fact being shown by plaintiff's affidavit affirmed to September 3, 1974. It did not change the substantive issue, since if he were disqualified under the CONSTITUTION of the UNITED STATES to be VICE-PRESIDENT defendant FORD was as necessary consequence also disqualified to succeed from that office to the office of PRESIDENT of the UNITED STATES.

The court below fails to follow the district court

Judge Waddy of the District Court for the District of Columbia granted defendant

FORD'S motion to dismiss the complaint by order filed September 27, 1974, stating in pertinent part therein:

> " * * * the removal of a President or Vice-President from office and denial of the remuneration of such office, as sought in plaintiff's complaint, is an issue committed exclusively to a coordinated political department, see Article I, Section 2, clause 5, Article I, Section 3, Clauses 6 and 7 of the Constitution of the United States, and, thereby, presents a political question over which this Court does not have subject matter jurisdiction. Baker v. Carr, 369 U. S. 186 (1961) * * * " (A-1-2)

The District Court thus erroneously construed the complaint as invading the impeachment powers of the Congress, when those powers apply only to a President and Vice President who have been constitutionally elected or appointed to their office and thereafter commit in office "Treason, Bribery, or other high Crimes and Misdemeanors." Article II, Sec. 4. The complaint at no point alleged that defendant FORD had committed in office any of these offenses, and solely alleged acts before he took the oath of office that barred him from ascending to his high office.

Thus the Court of Appeals correctly refused to follow the opinion of the District Court, and selected lack of "standing to sue" as its

obstacle to granting plaintiff the declaratory relief prayed for. The Court stated in pertinent part:

> " The 'political question' doctrine need not be considered here because appellant lacks standing to sue. This Court will follow the precedent of Ex Parte Levitt, 302 U. S. 633 (1937), which dismissed for lack of standing the complaint of a citizen and member of the bar of the Supreme Court that Justice Black was prohibited by the Emoluments Clause from serving as a Supreme Court Justice. The Court held the judicial power could not be invoked by one whose interest is "merely a general interest common to all members of the public'. 302 U. S. at 634. The vitality of this principle is indisputable, as appears from recent decisions dismissing complaints by persons whose interests were deemed undifferentiated from that of the general public. United States v. Richardson, 418 U. S. 166, 176-179 (1974); Schlesinger v. Reservists Committee To Stop the War, 418 U. S. 208, 220 (1974)." (A-3-4-5).

None of the cases cited by the court below is an election or voting rights case, and in none was the "general public" split into two major party opposing camps, as here.

REASONS FOR GRANTING THE WRIT

A. "BUT WHEN THE QUESTION IS, WHO IS THE EXECUTIVE OF THE STATE, THE JUDGES HAVE FUNCTIONS TO PERFORM * * * ."

Almost 50 years ago Cooley wrote in his treatise on CONSTITUTIONAL LIMITATIONS (8th ed., Vol. II, 1927):

> "But when the question is, who is the executive of the State, the judges have functions to perform, which are at least as important as those of any other citizens, and the fact that they are judges can never be a reason why they should submit to a usurpation.
>
> "A successful usurpation of the executive office can only be accomplished with the acquiescence of the other departments; and the judges, for the determination of their own course, must in some form inquire into or take notice of the facts.
>
> "In a controversy of such momentous import, the most formal and deliberate inquiry that the circumstances will admit of is alone excusable; and when made and declared, the circumstances must be extraordinary in which it will not be effectual. In the case referred to, * the usurper, though the candidate of a party embracing half the voters of the State, found himself utterly stripped of power by the decision of the court against him; public support fell away from him, and success in his usurpation became an impossibility." (p. 1411)

* Attorney-General v. Barstow, 4 Wis. 567.

B. The decision below is an extension by the federal judiciary of the scope of the Watergate "cover-up".

Acting not out of corrupt motive but judicial timidity, the court below has concealed by taking refusge in the "lack of standing to sue" doctrine and distorting it, the unconstitutional and fraudulent means by which respondent Gerald R. Ford ascended to the high office of Vice President of the United States and then President of the United States. By the unprecedented extension to a voting rights and election case of the "lack of standing to sue" doctrine of Ex Parter Levitt, 302 U. S. 633 (1937) and the patent fiction that "the general public", including the McGovern-Shriver voters of which one was petitioner herein, and the Nixon-Agnew voters, had an "undifferentiated" and "common" interest

at the November 7, 1972 general election, the Court below leaves the fruits of that tainted and corrupt election in the hands of respondent Gerald R. Ford. Thus, granting the writ herein is necessary to resolve a federal question of the highest national importance that has been incorrectly decided by the court below, and which will otherwise extend the scope of the Watergate "cover-up" by means of the federal judicial system. Only by granting the writ herein will the erroneous and unprecedented extension of the doctrine of Ex Parte Levitt to voting rights and election cases be corrected.

C. The decision of the Court of Appeals negates 90 years of judicial decisions.

The refusal of the court below to give petitioner standing to sue to review the fairness and freedom from corruption of the 1972 Presidential election repudiates a course of federal justice that for more than 90 years has recognized the rights of access to the courts by voters to secure fair and honest elections. * Not once before to our knowledge

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* See Ex Parte Yarbrough, 110 U. S. 651 (1884); In re Quarles, 158 U. S. 532 (1895); Hardyman v. Collins, 341 U. S. 651; United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330; Wesberry v. Sanders, 376 U. S. 1 (1964); Williams v. Rhodes, 393 U. S. 23 (1968); O'Brien v. Brown, 409 U. S. 1 (1972), dissent, 15; Oregon v. Mitchell, 400 U. S. 112; Burroughs v. United States, 290 U. S. 534 (1934); Common Cause v. Democratic National Committee, 333 F. Supp. 803 (D. D. C. 1971) Duncantell v. City of Houston, 333 F. Supp. 973 (1971); Moore v. Ogilvie, 394 U. S. 814; Reynolds v. Sims, 377 U. S. 533; Rising v. Brown, 313 F. Supp. 824 (1970); Straus v. Gilbert, 293 F. Supp. 214 (1968); Bell v. Southwell, 376 F. 2d 659; Toney v. White, 488 F. 2d 310, Hadnott v. Amos, 394 U. S. 358 (1969); Taylor v. Monroe County Board of Supervisors, 421 F. 2d 1013 (1970); Allen v. State Board of Elections, 393 U. S. 544 (1967); Hadley v. Junior College Dist., 397 U. S. 50 (1970); Avery v. Midland County, 390 U. S. 474 (1968); United States v. Classic, 313 U. S. 299 (1941), Dunn v. Blumstein, 405 U. S. 330 (1972); Baker v. Carr, 369 U. S. 186

have the doors of the federal courthouse been shut against the plea of a dishonest and corrupt election. It is singular that they should oe shut here so as to keep from judicial examination an election that paralleled the grossest acts of high Executive dishonesty in American history. The decision of the court below constitutes a perversion of the policy of Reynolds v. Sims, 377 U.S. 533 (1964):

> Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (561-562). (emphasis supplied)

The power to protect the choice of electors from fraud or corruption was recognized in Burroughs v. United States, 290 U.S. 534 (1934). And this Court therein stated:

> "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." (546) (our emphasis)

It may not fairly be doubted that the judiciary shares with the Congress this indispensable power of vigilance to ensure fair elections.*

* As this Court stated in Williams v. Rhodes, 393 U.S. 23:

> "Tne requirements imposed by Due Process clause remains the same - no matter what the institution to which the decision is entrusted, political groups have the right to be heard before it." (p. 42)

D. Since the only correct meaning of "elected" as used with respect to the President and Vice President of the United States in Article II, Section 1 of the Constitution is by "fair and honest methods" and there is no "valid election' in English or American common law when the Executive's election is procured "by fraud, intimidation, or corruption" (State ex rel. LaFollette v. Kohler, 200 Wis. 518 at 555-556), and this Court has held in Coleman v. Miller, 307 U.S. 433, that legislators had standing to protect "the

effectiveness of their votes", then a fortiori, the voters who elect the legislators must have standing in this Court and below to protect "the effectiveness of their votes."

In United States v. Smith, 286 U.S. 6, members of the Senate were deemed to have standing to challenge the method by which their votes had been counted in confirmation of a Presidential appointee. Since Senators and other legislators are merely the agents of the electorate, to confer a greater access to the federal courts upon them than is conferred upon their principals is to make the servant superior to the master. The decision below violates the established principle

that "The law should never suffer an injury and damages without a remedy." Kujek v. Goldman, 150 N.Y.176.

E. The petitioner in Ex Parte Levitt, supra, in seeking unsuccessfully, to enforce the "Emoluments Clause" against a member of this Court failed to allege "that he has sustained...a direct injury " Ex Parte Levitt, supra, at 634. Here petitioner and the 28,357,667 voters for the McGovern-Shriver ticket similarly situated and upon whose behalf he sues, sustained the direct injury of losing the election and therefore the effectiveness of their vote as

a result of the corruptly procured re-election of Richard M. Nixon and Spiro T. Agnew as President and Vice-President of the United States, accompanied by nondisclosure of their acts of criminal tax evasion, obstruction of justice and the conspiracies that sent Mitchell, Haldeman, Ehrlichman, Kalmbach, Magruder, into the courts to face indictments with 19 other White House accomplices and resulting in guilty pleas or convictions. It is undeniable that respondent FORD owes his position to President Nixon's re-election by these corrupt means and that the Republican Party and other Nixon-Agnew voters have suffered no "direct injury"

comparable to petitioner and the similarly situated 28,357,667 McGovern-Shriver voters whose representatives lost their campaign for election to the Presidential offices. Thus the injury of losing the election is not a "generalized" injury "undifferentiated from that of the general public" (Ex Parte Levitt, supra), since a substantial part of that public succeeded in electing the Nixon-Agnew candidates to their high offices, thus making possible the subsequent appointment of respondent FORD as Vice President and his subsequent accession to the office and title of President of the United States.

F. Tne fact that this Court ruled some 39 years ago that the Emoluments Clause could not be enforced by a member of the Bar

of this Court against Mr. Justice Black should have no value as a precedent, since LEVITT, the petitioner, could show no "direct injury" and he had not even lost a case due to the vote of Mr. Justice Black. Here petitioner and his 28,357,667 similarly situated McGovern-Shriver voters have lost a Presidential election due to the acts complained of. The magnitude of their injury is so vast in its impliacations by comparison toLEVITT's claim as to make his case worthless as a precedent, and since the only two other cases cited by the court below in support of its ruling (United States v. Richardson,

418 U. S. 166, 176-179 (1974); Sahlesinger v. Reservists Committee to Stop the War, 418 U. S. 208, 220 (1974)), are founded on Ex Parte Levitt, supra, and are not election or voting rights cases, the decision below is plainly without support in authority and contra the vast host of election and voting rights cases decided in this Court and the lower federal courts during the past 90 years. (p. 13, supra). Thus, despite the exalted office of respondent, the writ should be granted in order to extirpate the pernicious and novel doctrine that a losing voter has no standing in the federal courts to protest a corrupt election at the highest level of Government.

G. Since in enacting Public Law 93-178 (December 10, 1973), Congress declared that a person aggrieved by a Presidential appointment, namely that of an Attorney-General of the United States, for alleged violation of the Emoluments Clause of the Constitution, could sue in the federal courts to nullify the appointment, there is no basis for holding that a voter aggrieved by the appointment of a Vice President in violation of that Clause should not have similar access to the federal courts.

H. This Court has never decided any of the profoundly important issues raised herein bearing on the purity of the Presidential election process, and the enforcement by a voter of a right to an honest and fair election under Article II, Section 1, of the Constitution of the United States and under the common law. In this Presidential election year it is of national and world significance for this Court to affirm that right and to give a judicial remedy for its denial, even if that remedy touches upon the occupant of the highest office in the land.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

RANDOLPH PHILLIPS
30 East 72nd Street
New York, N. Y. 10021

Petitioner Pro Se.

April 20, 1976

APPENDIX

Order of United States District Court for District of Columbia, per Waddy, D.J., entered 9/27/1974

O R D E R

Upon consideration of the motion of defendant Gerald R. Ford to dismiss the complaint herein, the memorandum of points and authorities in support thereof and the opposition thereto, and upon further consideration of plaintiff's motions for declaratory judgment and for summary judgment on Count III of the complaint, the memoranda of points and authorities in support thereof and in opposition thereto, and the entire record herein, and it appearing that plaintiff's complaint, filed May 15, 1974, sought:

1. To enjoin then-President Nixon and then-Vice-President Ford from occupying their respective offices on the ground that the 1972 election was won by fraudulent means;
2. An order of this Court requiring defendants Nixon, Agnew and Ford to refund to the United States Treasury all salaries paid to them while occupying the offices of President and Vice-President; and

3. Plaintiff's motion for summary judgment on Count III of the complaint requests this Court to declare the appointment of defendant Ford to the Vice-Presidency to be invalid under Article I, Section 6, clause 2 of the Constitution of the United States and to enjoin this defendant from occupying the office of President;

and it further appearing to the Court that the removal of a President or Vice-President from office and denial of the remuneration of such office, as sought in plaintiff's complaint, is an issue committed exclusively to a coordinate political department, see Article I, Section 2, clause 5, Article I, Section 3, Clauses 6 and 7 of the Constitution of the United States, and, thereby, presents a political question over which this Court does not have subject matter jurisdiction, Baker v. Carr, 369 U.S. 186 (1961); Konigsberg v. Nixon, No. 73-2455 (9th Cir. March 11 1974); Coffman v. Nixon, Civil Action No. W-5155 (D. Kan. Feb. 1, 1974); it is therefore by the Court this 26th day of September, 1974,

ORDERED that the motion of defendant Gerald R. Ford to dismiss be, and the same hereby is, granted, and it is further

ORDERED that the complaint herein be, and the same hereby is, dismissed on the ground that the Court does not have jurisdiction of the subject matter of this action.

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(b).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-2060 Civil 74-736

Randolph Phillips, Appellant

v.

Gerald R. Ford, et al

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: McGOWAN and LEVENTHAL, Circuit Judges and BRYAN,* United States District Judge for the Eastern District of Virginia

J U D G M E N T

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

FILED JAN 21 1976

United States Court of Appeals
for the District of Columbia Circuit

Per Curiam
For the Court

Robert A. Bonner

Robert A. Bonner
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(d)

No. 74-2060 -- Randolph Phillips v. Gerald R. Ford, President (Before Circuit Judges McGowan, Leventhal and District Judge Bryan*)

Memorandum

Appellant Phillips, as chairman of The Committee for Fair Play for Voters, and as a qualified voter suing in his own and on behalf of all other voters similarly situated, filed a complaint, on May 15, 1974, in the U.S. District Court alleging that Richard M. Nixon and Spiro T. Agnew obtained their reelection on November 7, 1972 by fraud, and therefore a qualified voter has the right to obtain a District Court determination of the legality of the appointment by Mr. Nixon (denominated a "usurper") of Gerald R. Ford as vice-president to succeed him in the event of resignation. Plaintiff claims this presents a justiciable issue, as does the claim in Count III of his complaint, that Gerald R. Ford became vice-president in violation of Article I, section 6, Clause 2 (the "Emolu-

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

ments Clause") of the Constitution, in that while he was a member of the House of Representatives, Public Law 91-67 was enacted (September 15, 1969) increasing the salary of the Vice President from $43,500 to $62,500, and Public Law 93-136 was enacted (October 24, 1973) giving "cost of living" increases to the annuity payable to the Vice President as federal retirement benefits. Mr. Nixon nominated Mr. Ford to the office of Vice President on October 12, 1973 and after confirmation by the Senate on November 27, 1973, and by the House of Representatives on December 6, 1973, Mr. Ford assumed the office of Vice President. Subsequent to the filing of the complaint, Mr. Nixon resigned and Mr. Ford took the oath as President of the United States. On September 27, 1974, the District Court dismissed the complaint for lack of subject matter jurisdiction, on the ground that the relief sought in the complaint, the removal of a President or Vice President from office and the denial of his remuneration in office, presents a political question over which the court does not have jurisdiction.

The "political question" doctrine need not be considered here because appellant lacks standing to sue. This court will follow the precedent of Ex parte Levitt, 302 U.S. 633 (1937), which dismissed for lack of standing the complaint of a citizen and member of the bar of the Supreme Court that Justice Black was prohibited by the Emoluments Clause from serving as a

Supreme Court Justice. The Court held the judicial power could not be invoked by one whose interest is "merely a general interest common to all members of the public." 302 U.S. at 634. The vitality of this principle is indisputable, as appears from recent decisions dismissing complaints by persons whose interests were deemed undifferentiated from that of the general public. United States v. Richardson, 418 U.S. 166, 176-79 (1974); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220 (1974).

Affirmed.

Supreme Court, U.S.
FILED
JUN 3 1976
MICHAEL RODAK, JR., CLERK

No. 75-1509

In the Supreme Court of the United States

OCTOBER TERM, 1975

RANDOLPH PHILLIPS, ETC., PETITIONER

v.

GERALD R. FORD, PRESIDENT OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1509

RANDOLPH PHILLIPS, ETC., PETITIONER

v.

GERALD R. FORD, PRESIDENT OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, as chairman of the "Committee for Fair Play for Voters," on May 15, 1974, filed a complaint *pro se* in the United States District Court for the District of Columbia on behalf of himself and all similarly situated voters, alleging that then-President Nixon and Vice President Ford and former Vice President Agnew had gained their offices by fraudulent means. Petitioner additionally alleged that then-Vice President Ford was ineligible to be nominated Vice President by virtue of the Emoluments Clause of the Constitution, Article I, Sec. 6, Cl. 2, because the salary of that office had been increased while Mr. Ford was a member of the House of Representatives. The complaint sought, *inter alia*, a judicial declaration that the 1972 Presidential election was null and void, and an injunction prohibiting Messrs. Nixon and Ford from continuing in office (Pet. App. A-4 to A-5).

Defendants Nixon and Agnew apparently were never served and were thus not made parties to the suit (see petitioner's brief in the court of appeals, p. 4). The United States Attorney appeared for Mr. Ford and moved to dismiss the action on the grounds that petitioner was without standing to sue, and that the validity of the presidential election was a non-justiciable political question expressly committed to the Congress by Article II, Sec. 4, of the Constitution.

The district court, relying on the latter ground, granted defendant Ford's motion to dismiss for lack of subject matter jurisdiction (Pet. App. A-1 to A-3). The court of appeals affirmed *per curiam* (Pet. App. A-3 to A-6), on the ground that petitioner lacked standing to sue.[1]

The court of appeals is correct; petitioner's interest in respondent's eligibility to serve as Vice President and as President is merely a general one, common to all members of the public, and insufficient to invoke the judicial power. Petitioner therefore lacks standing to sue. See, *e.g.*, *Ex parte Lévitt*, 302 U.S. 633; *United States* v. *Richardson*, 418 U.S. 166, 176-179; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 220.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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[1]The court of appeals expressly did not reach the political question issue (see Pet. App. A-5).

DOJ-1976-06